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Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CLIFFORD FERGUSON, Petitioner

v

THE UNION CITY DAILY MESSENGER and
DAVID BARTHOLOMEW, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

CLIFFORD FERGUSON,	)	
	)	
Plaintiff-Appellee,	)	
	)	OBION LAW
v.	)	HONORABLE
	)	DAVID G. HAYES
THE UNION CITY DAILY MESSENGER, INC AND DAVID BARTHOLOMEW,	)	JUDGE
	)	
	)	NO. 02S01-9112-CV-00058
Defendants-Appellants.	)	

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O P I N I O N

JUDGMENT OF COURT OF APPEALS
AFFIRMED IN PART AND REVERSED

IN PART; JUDGMENT OF TRIAL
COURT AFFIRMED. REID, C.J.

This case presents appeals by all parties from the judgment of the Court of Appeals in an action by Clifford Ferguson, a former employee of Obion County, against the Union City Daily Messenger and its editor, David Bartholomew, for defamation, interference with employment, and other charges, in which the trial court granted the defendants' motion for summary judgment on all charges. Ferguson appeals from the decision affirming summary judgment for the defendants on the interference with employment charge, and the defendants appeal the reversal of summary judgment for the defendants on the defamation charge. The record supports the trial court's summary judgment on both charges.

Ferguson was employed by Obion County from 1978 until 1987, during which time he had three different titles, although his duties remained essentially the same throughout his

employment. His original title was Director of Accounts and Budgets and he reported to the County Judge. (The chief executive officer of the county in 1978 was the County Judge. The name of the position later was changed by statute to County Executive.) In 1979, Ferguson's title was changed to Finance Director, and he was responsible to a committee of the County Commission. As Finance Director he employed Vickie Brown Graham as his secretary. In 1983, as the result of litigation initiated by the County Board of Education, the Finance Department was abolished, and he was given the title Purchasing Agent and directed to report again to the County Executive. After Graham's employment with the County ended in 1984, Treva Bond was hired in her position. However, Ferguson described Bond as a "co-employee" rather than his secretary. They worked in the same office.

Ferguson's job description as Purchasing

Agent, his title when the news articles were published, was as follows:

> The Purchasing Agent is the buyer for the County, obtaining the proper equipment, materials, supplies and services needed by the County departments. The Purchasing Agent will prepare solicitations, obtain quotations, conduct competitive bids for purchases and evaluate responses, awarding contracts to those bidders that meet the specifications and are in the est interest of the County. He will also issue and sign purchase orders, sign warrants for the county and the Highway Department, attend meetings, on occasion, that will better communications with the public and that are in the best interest of the public. He will also keep inventory of County property, talk continuously with the citizens of Obion County about the well being of this County and will serve as County Director of TOSHA (Safety) for the County.

The record does not include evidence with regard to each specific duty set forth in the job description but, the proof shows that Ferguson was responsible for obtaining bids for goods and services purchased by the County, choosing the bids to be accepted, placing purchase orders, approving payment after receipt of goods and services, and co-signing warrants issued by the County in

payment of its obligations. Ferguson's responsibility also included presenting bids at open sessions of the Budget Committee or the County Commission before they were sent to prospective suppliers. He admits that he was responsible for all aspects of purchasing goods and services on behalf of the County except the preparation of the warrants for payment.

Payments for goods and services purchased by the County were made by warrants signed by Ferguson and the County Executive. Ferguson testified that Bond was responsible for the preparation of the warrants and for mailing out the signed warrants. The County Executive testified that it was Ferguson's responsibility to see that the County's bills were paid.

The news reports claimed by Ferguson to be defamatory related to the failure of the County to pay its bills when due. While Bond was on maternity leave in 1985, Ferguson

reported to the County Executive that he had found unpaid bills in her desk and complained that Bond was not doing her work. In January, 1987, Ferguson produced unpaid bills which had been due in 1986. The County incurred more than $250 in penalty fees on utility bills because of late payments. Ferguson talked to vendors about unpaid bills, he publicly stated that vendors would not lose County business for complaining about unpaid bills, and he publicly requested vendors to contact him if they were having a problem getting paid. In 1987, the State suspended the County's credit with State agencies because obligations due the State had not been paid. The news articles lay the primary responsibility for the unpaid bills at Ferguson's feet.

Pursuant to the recommendation of a committee of the Commission, appointed to investigate the purchasing of and payment for goods and services on behalf of the county, the position occupied by Ferguson was

abolished and his employment terminated in June, 1987.

Plaintiff asserts that he lost his employment as a result of the news articles alleged to be defamatory. In response to discovery, Ferguson listed several dozen quotes from the newspaper articles which he contends were defamatory. He then stated in summary as follows:

> All of the items mentioned in this response, as well as the entirety of the articles at issue, are slanted to convey an impression that the Plaintiff was responsible for all of the financial problems of the County with regard to paying its bills, when the Defendants knew, or should have known, that the above statements were untrue, and that the Plaintiff was not responsible for the problems, and, in fact, had done all he was empowered and authorized to do to remedy the problems.

The statements alleged to be untrue did not involve any illegal or immoral conduct, but related to Ferguson's authority and the organizational relationship between him, Bond, and the County Executive. The substance of Ferguson's position is that Bond, not he, was

responsible for preparing County warrants. Ferguson assigns as a major discrepancy in the newspaper reporting that he was "the man who writes the checks to keep Obion County going." He contends that even though he was required to co-sign the warrants, Bond was responsible for actually preparing the warrants, and, therefore, the statement was not accurate and was therefore defamatory. References in the news articles to another aspect of this relationship between Ferguson, Bond, and the County Executive are claimed by Ferguson to be inaccurate, and, therefore, defamatory. Those statements were that Ferguson was Director of the Department of Finance and Purchasing and that Bond was his secretary. The inaccuracy claimed is that at that time his title was County Purchasing Agent, not Director of Finance and Purchasing, and that Bond was a "co-employee," not his secretary. Ferguson stated in his deposition that he did not know if Bond was his secretary; however, he

adamantly insists that though Bond "functioned as a secretary," he "never, at any time, admitted" that she was "his secretary." Along the same line, Ferguson insists that his quoted reference to "his office" meant "four walls and a door," not an official responsibility.

The record discloses the inescapable conclusion that Ferguson did not work cooperatively with Bond, even though they work din the same office. The County Executive testified that Ferguson opposed Bond's employment because she was black. Ferguson said he opposed her employment because "there were other people he thought were better qualified."

In response to the County Executive's testimony that it was Ferguson's responsibility to see that the bills were paid because he was in charge of the Department, Ferguson insists that "the record fails to show that Mr. Ferguson was ever advised that

he had any supervisory authority over Mrs. Bond," and "[m]oreover, there is no proof in the record that the defendants were ever told this by [the County Executive] or that they relied on his statement when attributing blame to Mr. Ferguson for failing to insure that the County's bills were paid timely."

Ferguson assets that reference in the articles to him as Purchasing Agent, Director of Finance, Director of Finance and Purchasing, and Director of Finance and Budgeting is evince of a reckless disregard of the truth and constitutes malice. Ferguson insists that the editor's stated belief that Ferguson was responsible for "seeing that the bills were paid" based on the "fact that he authorized payment and signed the checks" did not indicate lack of malice because Bartholomew "never asked County Executive Jarvis or Treva Bond whether they too had the authority to authorize payment." He assets as further evidence of malice the newspaper's

selection of news items. He states that the newspaper's view that "millions of dollars of taxpayers' money was being more properly and efficiently spent than in the past" was "not as newsworthy" as the failure of the County to pay its bills on time and that, on a particular date, an article regarding the County's financial problems was given more space than the allegation that another County employee "had embezzled thousands of dollars" show that the newspaper acted maliciously.

The trial court found that the plaintiff was a public official and that there was no material evidence to support a finding of malice and granted the defendants' motion for summary judgment.

The Court of Appeals affirmed the trial court's summary judgment on all counts except the charge of defamation. The Court of Appeals, upon reviewing the evidence, found there was a

> dispute as to whether Ferguson was responsible for seeing that the

> bills of Obion County were paid. Therefore, there is a genuine issue of fact regarding the scope of Ferguson's responsibilities as Purchasing Agent, which is determinative of his status as a public official under Press, Inc. [v. Verran, 569, S.W.2d 435 (Tenn. 1978].

That court did not address the trial court's decision that there was insufficient evidence to support a finding of malice.

The defendants assert that the Court of Appeals erred in reversing the trial court's award of summary judgment. Their contention is that publication of the news articles and editorials are protected by the First Amendment to the United States constitution and Article I, Section 19 of the Tennessee Constitution. The First Amendment states in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press. . . .

In New York Times Co. v. Sullivan the United States Supreme Court stated:

> The constitutional guarantees require, we think, a federal rule

> that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S. Ct. 701, 726, 11 L.Ed.2d 686, 706 (1964). See also, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 2681, 105 L.Ed.2d 562 (1989).

Article I, Section 19 provides in pertinent part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The right to publish granted by Article I, Section 19 is subject only to "being

responsible for the abuse of that liberty."

In Press, Inc. v. Verran, the defendants relied upon both the state and federal constitutions for protection in an action for defamation based on certain newspaper articles. In comparing the protection afforded under the state and federal constitutions, this Court stated with reference to Article I, Section 19:

> To the extent of this controversy this is a substantially stronger provision than that contained in the First Amendment to the Federal Constitution ("Congress shall make no law . . . abridging the freedom . . . of the press') in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification.
>
> Press, Inc. v. Verran, 569 S.W.2d at 442.

That difference in protection afforded, to the extent it may exist, is not material in this case. The Court stated further:

> This mandate of Tennessee's Constitution requires that any infringement upon the "free communication of thoughts" and any stumbling block to the complete freedom of the press "to examine

> [and publish] the proceedings . . . of any branch or officer of the government" is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.
>
> But it does not constitutionalize false and malicious defamations, and publishers are answerable for abuse. We equate "abuse of that liberty," as used in our constitution, with the phrase "actual malice" as used in new York Times.

Id.

Under both the state and federal constitutions, the extent to which the right to publish may be limited is dependent upon the status of the person who claims to have been defamed. This Court in Press, Inc. v. Verran adopted Section 580A, Restatement (Second) of Torts (1977) as the standard for judging the defamation of a public official and Section 580b for judging the defamation of a private person. Those standards are as follows:

> Section 580A. Defamation of Public Official or Public Figure. One who publishes a false and defamatory communication concerning a public

official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other person, or

(b) acts in reckless disregard of these matters.

Section 580B. Defamation of Private Person. One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other,

(b) acts in reckless disregard of these matters, or

(c) acts negligently in failing to ascertain them.

569 S.W.2d at 442. With regard to these standards, the Court commented:

> We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction.

Id. Obviously, the difference in the

standards applicable to public officials and private persons is set forth in Section (c) of 580B. The following rationale stated for the adoption of the Restatement standards in that case is applicable to the case before the Court:

> In adopting these standards, we look to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." We are guided by our belief that the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and assess the performance of duty by public officials.
>
> Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and reporting, even though the end result may be distasteful, despicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth.
>
> Any other standard would have a chilling effect upon one of the most cherished of all the freedoms

specified in our bill of rights.

Id.

In the case at bar, the news articles obviously dealt with "official conduct," consequently, the first issue is whether the plaintiff was a public official or a private person. In Press, Inc. v. Verran, the Court developed further the criteria for making that determination:

> The occupant of any position in any branch of government who exercises any public function is subject to the New York Times rules as to all conduct in his official capacity or as to any conduct that might adversely affect his fitness for public office, if he has or "appear[s] to the public to have, substantial responsibilities for or control over the conduct of governmental affairs." Rosenblatt, [v. Baer, 383 U.S. 75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966).].
>
> This does not necessarily apply only to high public position....

Id. at 441. It is a question of law for the court as to whether the plaintiff is a public official within the meaning of the rule stated in New York Times Co. v. Sullivan and adopted

by this Court in Press, Inc. v. Verran. See generally Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499-511, 104 S. Ct. 1949, 1959-65, 80 L.Ed.2d 502 (1983) (discussing "the constitutionally-based rule of independent review" in cases involving restrictions on the freedom of speech).

The evidence in this case requires no further analysis to reach the conclusion that plaintiff was a public official within the meaning of Article I, Section 19 of the Tennessee Constitution and the First Amendment to the United States Constitution. The Court of Appeals construed the factual issue too narrowly. There may be, as stated by that court, a genuine issue of fact regarding the precise scope of Ferguson's responsibilities; however, the responsibilities acknowledged by Ferguson himself establish him as a public official and officer of the government. The right of the press to criticize government and its agents is not bound by the niceties of

titles or the legalistic definition of duties. Ferguson's duties throughout his employment by the County included substantial responsibility with regard to the financial and business affairs of the County. Whether Ferguson or Bond had the primary duty to prepare the warrants for signature and mail the signed warrants to the vendors, which is the only basic fact disputed, is not determinative of a material issue in this case. The efficient management of financial matters is crucial to the proper operation of government. Based on this record, Ferguson appeared to have, and in fact did have, substantial responsibility for an control over the conduct of the financial affairs of the County, which is an integral part of government. Ferguson was, therefore, a public official.

The trial court also found that there was no material evidence to support a finding of malice. The Court of Appeals made no finding with regard to malice on the charge of

defamation. The record supports the finding of the trial court o the issue of malice and that decision is affirmed.

The decision of the Court of Appeals regarding defamation is reversed, and the judgment of the trial court granting summary judgment to the defendants is affirmed.

The judgment of the Court of Appeals regarding interference with employment is affirmed for the reasons stated in the opinion of that court.

The result is that the judgment of the trial court granting summary judgment for the defendants on all counts is affirmed.

Costs are taxed to the plaintiff.

s/Lyle Reid
Lyle Reid, C.J.

Concur:

Drowota, O'Brien, Daughtrey,
and Anderson, JJ.

IN THE COURT OF APPEALS
OF TENNESSEE
WESTERN SECTION AT JACKSON

CLIFFORD FERGUSON,	)	
	)	
Plaintiff/	)	
Appellant,	)	
v.	)	OBION LAW NO.
	)	6437
THE UNION CITY	)	
DAILY MESSENGER,	)	
INC. AND DAVID	)	
BARTHOLOMEW,	)	
	)	
Defendants/	)	
Appellees	)	

From the Circuit Court of Obion County, Tennessee

The Honorable David G. Hayes

Ted M. Hayden, Memphis
Attorney for Plaintiff/Appellant

James M. Glasgow, Union City
Attorney for Defendants/Appellees

Opinion Filed: July 2, 1991

Affirmed in part,
Reversed in part, and
Remanded

HIGHERS, J.

TOMLIN, P.J., W.S. (Concurs)

FARMER, J. (Concurs)

This appeal arises from an action for

defamation, statutory interference with a contractual relationship, common law interference with an employment relationship, and outrageous conduct. The plaintiff, Clifford Ferguson, brought this action against The Union City Daily Messenger, Inc. (The Messenger) and David Bartholomew on January 29, 1988 in the Circuit Court at Obion County. After the parties had taken extensive discovery, the trial court granted the defendants' motion for partial summary judgment regarding the allegation of defamation. Prior to trial, the court granted defendants' motion for summary judgment on the three remaining allegations. Ferguson appeals the trial court's granting of a summary judgment on the first three counts but he does not appeal the summary judgment on the issue of outrageous conduct.

At all times pertinent to this appeal Ferguson was employed by the Obion County Government. Originally, he was hired by the

executive office to work as the Director of Accounts and Budgets. However, after Obion County's adoption of the Financial Management Act, Ferguson was elected by a seven person committee to act as "Finance Director." As Finance Director Ferguson's duties included accepting requisitions, signing purchase orders, taking bids for all departments, and signing all checks. However, pursuant to a suit brought by the School Board, the Financial Management Act was declared unconstitutional and the Finance Department created by the Act was abolished. Although the Financial Management Act had been repealed, Ferguson continued to operate as Finance Director until 1983. In 1983 the Budget Committee placed Ferguson's office, including Ferguson's secretary, under the direction of the County Executive, Mr. Jarvis. With this move came several changes. Ferguson's position was changed from Director of Finance to "Purchasing Agent." As

Purchasing Agent Ferguson was responsible for all of the purchasing procedures of Obion County, but, according to Ferguson, he was not responsible for seeing that the bills of Obion County were paid. Another change was that, in Ferguson's opinion, his secretary became his co-employee such that they were equals and he was not responsible for overseeing her work because they both answered to Jarvis.[1]

Bartholomew was the reporter responsible for covering the Obion County Government for The Messenger. He interviewed Ferguson and published several stories regarding the financial problems of the Obion County Government.

Ferguson brought this action against Bartholomew and The Messenger pursuant to the publishing of numerous stories regarding Obion

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[1]The Budget Committee created the position of Administrative Assistant and transferred the County Executive's secretary to that position, but it not clear whether this position was created for Ferguson's secretary or for someone else working under Jarvis.

County bills going unpaid and holding Ferguson responsible. After these articles were published in The Messenger, Ferguson's position was terminated by the Budget Committee.

Problems with Obion County's bills were first discovered by Ferguson in early 1985. In 1984 Mrs. Graham, who had originally been Ferguson's secretary (turned co-employee), left her job. Jarvis hired Treva Bond to fill the position. Ferguson was never informed of Bond's duties nor whether she was his secretary or co-employee. Ferguson believed that it was Bond's duty to pay the County's bills because he read that among the list of duties in her job description which was prepared for the state auditors. In the summer of 1985 while Bond was on leave of absence, Ferguson discovered some unpaid bills in a file drawer in the office they shared. Ferguson brought the unpaid bills to Jarvis' attention. Again in January 1987 Ferguson

found hidden about the office unpaid bills as well as invoices and checks he had signed. In the same month it was discovered that the credit extended to Obion County by certain state agencies in Nashville had been cut off because an invoice issued to the Obion County sheriff's department had not been paid. The attention of Bartholomew and The Messenger became noticeably focused on Obion County's financial situation when state agencies began refusing Obion County's credit.

Bartholomew began interviewing Ferguson regarding various past due bills, and running articles focusing on the County's nonpayment of bills. In numerous articles Bartholomew referred to Ferguson as the "Director of Finance" rather than Purchasing Agent, "the man who writes the checks to keep Obion County going," and "the man who . . . oversees the bill paying," and he referred to Bond as Ferguson's secretary. On May 22, 1987, Bartholomew ran an article focusing on the

County's nonpayment of utility bills. Immediately thereafter, the Budget Committee appointed a special committee to investigate the problem. In addition, Jarvis dismissed Bond. After an investigation, the special committee recommended that the Finance Department be abolished (apparently overlooking that the Finance Department was abolished after the Financial Management Act was repealed). On May 29, 1987, The Messenger ran an article discussing the special committee's findings and recommendation. The County Commission concurred with the findings of the special committee to abolish the Finance Department and to terminate Ferguson's position as of July 1, 1987.

Ferguson brought this action against Bartholomew and The Messenger alleging defamation, statutory interference with a contractual relationship, common law interference with an employment relationship, and outrageous conduct. The trial court

granted defendants' motion for summary judgment on all issues and Ferguson appeals on three issues. Finding that a genuine issue of material fact exists, we reverse in part and affirm in part.

I. Defamation

In deciding a motion for summary judgment the trial court must review the matter in the light most favorable to the party opposing the motion and must draw all legitimate conclusions of fact therefrom in the opposing party's favor. Graves v. Anchor Wire Corp. of Tennessee, 692 S.W.2d 420 (Tenn. App. 1985) In deciding a motion for summary judgment the trial court searches for a genuine issue of material fact based upon the grounds asserted in the motion, as supported by the record and affidavits supporting or opposing the motion together with legal presumptions, judicially noticed facts, and applicable principles of substantive law. T.R. Civ. P. Rule 56.03; Ferguson v. Tomerlin, 656 S.W.2d 378 (Tenn.

App. 1983). If, upon such such review, the court finds that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, then summary judgment is proper. Brookins v. The Round Table, Inc., 624 S.W.2d 547 (Tenn. 1981).

The trial court granted the defendants' motion for partial summary judgment finding as a matter of law that Ferguson was a public official and that the evidence presented by Ferguson was not such that a reasonable jury could find actual malice with convincing clarity.

Certain landmark decisions have defined the law of defamation. In order to recover damages for defamation, a public official must prove that the defamatory statement was made with actual malice as set forth in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). It is a question of law for a court to determine whether the plaintiff in a

defamation suit is a public official within the maning of New York Times. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court defined public officials as "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Id. at 85. The Court later noted that the category of "public official" does not include all public employees. Hutchinson v. Proxmire, 443 U.S. 111 (1979). The New York Times rule has been extended to public figures as well as public officials. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In Curtis Publishing Co. the Court defined a public figure as one who has both:

> commanded sufficient continuing public interest and had sufficient access to the means of counter-argument 'to be able to expose through discussion the falsehood and fallacies' of the defamatory statements. (citation omitted)

Id. at 155. Later, in Gertz v. Robert Welch,

Inc., 418 U.S. 323 (1974), the Court stated that one may be designated as public figure based on either of two alternative bases:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved.

Id. at 345. Thus, in determining whether one is a public figure, courts shall look at whether he has achieved fame or notoriety or whether he has become part of a public controversy.

The trial court looked to the case of Press, Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978) in determining that Ferguson is a public official. The court in Press, Inc. relied heavily on Gertz regarding the issue of public figures and public officials. In Press, Inc. a junior social worker was found to be a

public official. In reaching this finding the court relied on the trial court's finding that the junior social worker was acting as a representative of the Tennessee Department of Human Services and she had the power to have children taken from their parent's custody and to place them in foster homes and to lay down conditions for their return. Id. at 443. The court notes that to those parents, the social worker "was the very epitome of government." Id. at 443.

We distinguish Press, Inc. from the case at bar. In Press, Inc. the court found the junior social worker to be a public official based upon her representative capacity to the public and the fact that her job carried with it "duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family." Id. at 441. However, in his capacity as Purchasing Agent, Ferguson was not

representative of "the very epitome of government."

One of the issues in dispute is the scope of Ferguson's job. As in any appeal on a motion for summary judgment, we must look only at the facts in favor of the opponent of the motion. See Jones v. Home Indemnity Insurance Co., 651 S.W.2d 213 (Tenn. 1983) Ferguson has stated that as Purchasing Agent, he was responsible for the purchasing procedures of the County. His duties included sending out letters asking for bids, choosing the lowest bid and then sending a purchase order to the appropriate vendor. Ferguson performed his duties by following the purchasing procedures provided in the Tennessee statutes. He also co-signed the checks to pay the bills sent from the vendors. Thus, according to Ferguson's own description of his duties as Purchasing Agent, he had no direct contact with the public nor did his duties enhance or disrupt any citizen's enjoyment of life, peace

and tranquility or that of anyone's family. Ferguson's classification as a public official is largely based on the scope of his responsibilities and his duties as an employee of Obion County.

Upon reviewing the facts we find that there is a dispute as to whether Ferguson was responsible for seeing that the bills of Obion County were paid. Therefore, there is a genuine issue of fact regarding the scope of Ferguson's responsibilities as Purchasing Agent, which is determinative of his status as a public official under Press, Inc. A party to a lawsuit has the right to have all disputed issues fact decided by a jury. McCormic v. Smith, 668 S.W.2d 304 (Tenn. App. 1984). The determination of whether a plaintiff in a defemation suit is a public official within the meaning of New York Times is a question of law. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In the case sub judice the issue of Ferguson's scope of

responsibilities must be determined before there can be an accurate decision as to whether he is a public official. Ferguson has a right to a jury trial on factual questions involved in legal issues. See Monroe Auto Equipment Co. v. Heckethorn Manufacturing and Supply Co., 214 F.Supp. 704 (W.D. Tenn. 1963) cert. denied 379 U.S. 888 (1964). Therefore, there is a genuine issue as to a material fact regarding the scope of Ferguson's responsibilities and summary judgment is not proper. We reverse and remand this issue to be tried and determined in the court below.

II.

The second issue on which Ferguson appeals is the trial court's granting of defendants' motion for summary judgment on the issues of statutory and common law interference with a contractual relationship. In Tennessee the statute governing interference with a contractual relationship is declaratory of the common law except as to

the amount of damages that may be recovered. Emmco Insurance Co. v. Beacon Mutual Indemnity Co., 204 Tenn. 540, 551, 322 S.W.2d 26, 231 (1959). The statute governing unlawful interference with contracts states:

> 47-50-109. Procurement of Breach of contracts unlawful - Damages.- It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in the treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring his suit for the breach and for such damages.

The seven elements in a cause of action for procurement of a breach of contract are: 1) there must be a legal contract; 20 the wrongdoer must have known of the existence of the contract; 3) the wrongdoer must have intended to induce the breach of the contract; 4) the wrongdoers must have acted maliciously; 5) the contract must have been breached; 6)

the act complained of must have been the proximate cause of the breach; and 7) the damages must have resulted from the breach. Campbell v. Matlock, 749 S.W.2d 748, 751 (Tenn. App. 1988). The defendants assert that the plaintiff has failed to prove at least two of these elements. The trial court granted defendants' motion for summary judgment regarding statutory interference of a contract on the basis that Ferguson failed to prove that there was any intention on the part of the defendants to induce the breach of Ferguson's employment contract and Ferguson failed to show that the defendants acted maliciously. The trial court also found that the affirmative defense of constitutional privilege did apply in the case sub judice.

First we shall address the issue of whether Ferguson has shown that there is a genuine dispute as to a material fact regarding the defendants' intent to induce a breach of Ferguson's employment contract with

Obion County. In order to prove defendants' intent to induce a breach of Ferguson's employment contract, Ferguson submitted the sworn affidavit of Jean K. Green, who was an employee of The Messenger from 1973-84. While employed by The Messenger, Green worked in the news room with defendant, Bartholomew, and whenever Bartholomew would leave to cover a County Commission meeting he would stop at Green's desk and state that "they are going to fire your friend today," which was a reference to Ferguson. Furthermore, Green states that Bartholomew had only negative things to say about Ferguson and it was Green's understanding that Bartholomew wanted Ferguson removed from office. The fact that it was Green's understanding that Bartholomew wanted Ferguson removed from office puts into controversy the question whether defendant Bartholomew intended to induce the breach of Ferguson's contract.

However, the defendants also assert that

Ferguson has failed to prove that the defendants acted maliciously. Ferguson presents the Green affidavit to prove the defendants' malice, as well. We note that although the Green affidavit may raise some question as to Bartholomew's intent, it does not show that Bartholomew acted maliciously. Looking only at the evidence in favor of Ferguson we find no evidence to support the claim that the defendants acted maliciously, and therefore Ferguson is unable to meet all seven conditions required to prove statutory interference with a contractual relationship. There is no dispute of a material fact regarding this issue and summary judgment is proper.

Because the statute is declaratory of the common law tort of interference with a contract except as to the amount of damages, we find that summary judgment is also proper regarding the allegation of common law interference with a contract.

We remand the issue of defamation to the trial court to be tried before a jury. On all other issues we affirm. Costs on appeal are adjudged against the defendants.

s/_____
HIGHERS, J.

s/_____
TOMLIN, P.J., W.S. (Concurs)

s/_____
FARMER, J. (Concurs)

IN THE SUPREME COURT
OF TENNESSEE
AT JACKSON

CLIFFORD FERGUSON	)	
	)	
Plaintiff-Appellee,	)	
	)	OBION LAW
V.	)	Hon. David G. Hayes, Judge
THE UNION CITY DAILY MESSENGER, INC., AND DAVID BARTHOLOMEW,	)	NO. 02S01-9112-CV-00058
	)	(Obion Law No. 6437)
Defendants-Appellants.	)	

O R D E R

The Court has considered the petition for rehearing filed by the Appellee and is of the opinion that the petition is without merit. Accordingly, the petition to rehear is denied.

PER CURIAM

(Filed January 19, 1993, Jewel Redden, Clerk)

IN THE CIRCUIT COURT
FOR THE TWENTY-SEVENTH
JUDICIAL DISTRICT
OBION COUNTY, TENNESSEE

CLIFFORD FERGUSON	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
V.	)	6437
	)	
THE UNION CITY DAILY MESSENGER, INC., and DAVID BARTHOLOMEW,	)	
	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT
COURT'S RULING
January 10, 1990

BEFORE: The Honorable David G. Hayes

APPEARANCES:

For the Plaintiff: Mr. Ted M. Hayden
Less & Scroggs
Attorneys at Law
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For the Defendants: James M. Glasgow, Sr.
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Prepared by: Jeannie A. Noles
Certified Court Reporter
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COURT'S RULING

THE COURT: All Right, gentlemen, I have listened with all due caution to the arguments that have been presented, and I'm ready at this time to state the opinion and findings of the Court.

As we have already established, this matter is before the Court on the Defendant's Motion for a Summary Judgment or a Rule 56 Motion.

The Court has reviewed all of the pleadings in this cause, the amended pleadings that have been filed, the interrogatories, the depositions, the affidavits and all other matters of discovery that have been completed and filed in this cause in the entire voluminous record. As I have indicated, it has been reviewed and examined by the Court.

From this record, the Court finds that the Plaintiff, Mr. Ferguson, served as the purchasing agent for Obion County government. Previous to this, he held a title of Budget

Director and Director of Financing. This is found in Paragraph 1, 5, 6, 7 of the Plaintiff's Complaint.

The further finding of the Court from the statement or rather the affidavit of Robert T. Jarvis, who was at that time serving as the County Executive and the supervising authority over the Plaintiff, the statement of Bob Jarvis being relied upon is,

> "I relied upon Mr. Ferguson to carry out duties and responsibilities of handling purchases as well as some of the other duties in regard to county finances. These duties include paying and settling accounts, preparing and co-signing warrants in payment of county bills and salaries."

The Court further considered the affidavit of the party, William P. Burnett, who has been Chairman of the Budget Committee of Obion County, and find this particular portion of the affidavit of Mr. Burner who states,

> "Mr. Ferguson's duties continue to be substantially the same as those he had while he was Financial Director except that he did not have

> jurisdiction over the Board of Education and was not Chief Financial Officer. He attended most of the budget meetings. At the meetings, he discussed budgetary issues in the contents of the budget with members of the Commission. The kind of work that he did put him in contact with the business people in the area in the buying and the bidding of goods, supplies, machinery and equipment and the payment of bills."

I would further reiterate that these affidavits that the Court is finding from are not being considered for the purpose of disputed issues regarding defamatory material, but rather they are being considered for the limited purpose of the issue of the public official issue.

I further, in the application of the courts of this state in their holding as to what constitutes public officials, primarily the Verran case, Press, Incorporated v. Verran, 569 South West 2nd, 435, it is the Opinion as stated by the Supreme Court of Tennessee,

> "Any position of employment that carries with it duties and

> responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his piece and tranquility or that of his family as a public office within the meaning of the constitutional privilege."

The application of the law to what the Court finds from the facts, it is, therefore, the opinion of this Court from other facts that have been gleaned throughout the entire record in this cause that the Plaintiff, Clifford Ferguson, was a public official.

It is, therefore, to be determined following this from the standards that have been established from the numerous cases in the United States, primarily the Sullivan case and others that the courts of this state have adopted, there must be a determination of the issue, as this Court sees it.

The standard to be applied is whether the Defendants alleged defamatory, or in this case, defamatory, for taking that issue as being truthful. Publication was made either; one, knowing that it was false or; two, made

with reckless disregard of whether it was false or not, this being the standard as this Court sees it, which has been adopted under the cases of the standard of actual malice standard.

From that perspective, this Court is assuming from the review of all the facts of this case for the purpose of this hearing, that all allegations are true if disputed.

This still leaves this Court with the issue as to whether or not the issue of actual malice is a valid and pending issue.

This Court has familiarized itself with all of the forty-seven items of defamatory content and the form of that content and has reviewed those facts and has reviewed those particular allegations.

The Court finds form its obligation and defines its obligation that it is not here to determine why the Defendant Bartholomew failed to do certain acts or why he failed or chose not to draw certain inferences, nor whom the

secretary was whose, as has been referred to, nor is it the duty or function of the Court as it defines it duty not to determine whether in this particular case, as has been alleged, that Clifford Ferguson was the Director of Finance and Purchasing, as has been alleged, or the Purchasing Agent or the County Finance Director.

The issue before this Court is that of actual malice. It is not neither the function of this Court as it sees its duties to determine what editorial space or size should be allocated for various news items in the local newspapers.

After reviewing and making those statements, reviewing the facts of this case, this Court finds, and that is consistent with the allegations and statements of previous Supreme Court Decisions that the courts have held, and this Court subscribes to this same holding, that erroneous statement is inevitable in free debate, and that it must be

protected in the freedoms of expression or to have the breathing space that are needed.

Based upon those findings of fact and statements that I have submitted to you, gentlemen, this Court finds that the evidence is presented as such that a reasonable jury could not find that actual malice has been shown by the Plaintiff with convincing clarity.

Therefore, there being no genuine issue of facts, the Motion for Summary Judgment is granted and this cause is dismissed.

That leaves the issue that was previously raised, and that issue being as to whether or not there was a contractual interference of law with the employment situation between Mr. Ferguson and the County Court.

I would like for that to be addressed if we could at this time. The court will take a ten-minute recess before we begin that.

(Whereupon, a recess was taken 4;10 p.m.-4:15 p.m.)

THE COURT: Be seated, please. I believe that before the last recess, we were back before the Court on the issue and raised by the Summary Judgment response for the Plaintiff as to the contractual interference.

Where are we on that issue? The question, I guess, is whether that is before the Court at this time, and what is the position of the Defendant on this matter?

MR. GLASGOW: If Your Honor please, the position of the Defendants is that Mr. Ferguson testified in his deposition on Page 95, I believe, that he was employed on a day-to-day basis.

We would submit that on that basis, he actually is an employment at will, whether it be that his paychecks come every two weeks or once every month.

On that basis, if Your Honor please, we submit that there would have been no tortious interference with the contract because it would have been left entirely up to those who

were responsible for abolishing that position to take whatever action that they wanted to take.

They did not dismiss Mr. Ferguson, per se. All that the County Commission did was to abolish his position. We submit, if Your Honor please, that that does not amount to a tortious interference with a contract.

There is no proof here that what The Messenger did caused his dismissal or interference with any contract in the sense of the law, although as a result of that and public opinion and all of the other things happened. The result was that the position was abolished.

Mr. Burnett said in his affidavit that after the position was abolished, Mr. Ferguson didn't say anything to him about being employed by the County or in another office in a different position.

We submit that there is no proof here that would show that there was any tortious

interference with the contract.

MR. HAYDEN: Your Honor, I will add a little bit to what I said previously. But let me reiterate once again, nowhere does the motion filed address the other two counts. It only addresses the defamation count. Nowhere in the briefs where there any mention of anything but the defamation count.

In fact, prior to our aborted hearing back in early December, I believe it was, I filed a memorandum in opposition stating that.

This is a Motion for Partial Summary Judgment. We're talking about the defamation count, and that's it. There was never any mention that that was incorrect or that the motion included anything other than the defamation count until I got here today.

We, obviously, under the Rules of Civil Procedure and under the local rules are entitled to respond to motions.

If a motion is somehow converted to something that doesn't say on its paper, we're

entitled to respond to it, but getting past the issue that it's just not before the Court. It hasn't been filed and it's not before the Court.

Let me address substantially what was said by opposing counsel. First of all, when I included that count, in the complaint were those counts. In the Complaint, there are two counts, common law and statutory.

I did some research that shows it doesn't matter that there was a day-to-day employment relationship. There still was a contractual employment relationship that was interfered with.

So, the only fact that I can understand that the Plaintiff -- one fact supporting a Motion for Summary Judgment on two counts of the Complaint is that the Plaintiff was employed on a day-to-day basis.

That's not a genuine fact under the case law, and I, obviously, won't have that with me and I'm not ready to cite it because I had no

idea we're here on this motion.

Then lastly, about abolishing the position, the proof in the record is that no position was abolished because there was no position.

The proof in the record is that it was supposed to get rid of Clifford Ferguson, and that's what happened. So, he was fired. He was fired from a contractual relationship.

And even if it weren't before the court, there's been no proof, facts, law or otherwise to show that they're entitled to be granted a Summary Judgment.

Obviously, in the law under the statute of the common law of Tennessee, there's nothing like actual malice that they can rely on to say: Regardless of what the facts are, we're entitled to Summary Judgment.

So, first of all, it's not before the Court. We weren't ready to hear it and it's not before the Court.

THE COURT: That's a question that I

have: Is it before the Court? Your position is that it is not before the Court; that you are not here to argue that; that you are not prepared to defend that issue.

MR. HAYDEN: No, Your Honor. There's nothing in the record about a Motion for Summary Judgment on those two counts at all. And even if it were, Your Honor, substantially, it just couldn't be granted on the record.

THE COURT: I'm inclined to agree that that matter is not before the Court at this time. We'll have to set that for a Motion for Summary Judgment on that issue.

Do you want to try to schedule it now since this case is set for trial?

MR. HAYDEN: Your Honor, I don't even have my calendar with me. We could probably have a conference call on the telephone or something, but any Motion for Summary Judgment has to be on file thirty days.

THE COURT: I believe that's right.

MR. HAYDEN: We're pushing the trial date right there. Then I'm entitled to "X" days to respond to anything he files. I don't know if we can get it in by the trial date.

I will certainly go back to my office and get my calendar and we can get on a conference call and see if it could be scheduled.

THE COURT: Mr. Glasgow, what do you about that?

MR. GLASGOW: If Your Honor please, I'm amenable to whatever the Court wants to do in that regard. I have three days of depositions set in a medical malpractice case week after next commencing on Monday. They go through Wednesday. Aside from that, I think I can get somebody else in my office to cover on anything else I have.

THE COURT: I tell you what we can do. Maybe we can attempt to get a date. Mr. Hayden, you don't have your calendar here with you?

MR. HAYDEN: I apologize, Your Honor. I

had no idea dates would be an issue here. I thought we had a trial date and that was it.

THE COURT: The only thing we can do is adjourn and attempt to resolve this by a conference call sometime this week. I will be available for the call tomorrow. I have a trial Friday -- Monday is a holiday -- or Tuesday, whichever you think you can do.

MR. HAYDEN: Your Honor, I'm in the Court of Appeals on Tuesday but tomorrow or Friday, I will be available.

THE COURT: After, say, 10 o'clock in the morning?

MR. GLASGOW: If my throat doesn't get the best of me.

THE COURT: I don't have the conference capabilities, so I'm going to have to rely on somebody to set that up.

MR. HAYDEN: We would have those capabilities and would be willing to do it. I'm assuming we're talking about tomorrow.

THE COURT: Tomorrow afternoon.

MR. HAYDEN: Tomorrow afternoon. Yes, Your Honor, I will call both you and opposing counsel separately and make sure everything is alright, and then I will set up the conference call.

THE COURT: That's find. Any other issues remaining other than this matter that we need to set for a later date?

MR. HAYDEN: Not that I can think of, Your Honor.

THE COURT: Okay. Court then stands adjourned.

REPORTER'S CERTIFICATE

STATE OF TENNESSEE)
) ss:
COUNTY OF DYER)

I, Jeannie A. Noles, Certified Court Reporter and Notary Public at Large, with offices in Lewisburg, Tennessee, hereby

certify that I reported the above mentioned Motion for Summary Judgment on the 10th day of January 1990, and that the Court's Ruling was reduced to typewritten form by me, to the best of my skills and abilities, consisting of 14 pages, including this page.

That i am not kin to any of the parties or their respective counsel herein, nor do I have any financial interest, or otherwise interested in the outcome of these proceedings.

I hereunto set my hand and seal.

s:_____
Jeannie A. Noles,
Certified Court Reporter
and Notary Public at Large
My Commission Expires:
1/11/92

IN THE CIRCUIT COURT FOR THE
TWENTY-SEVENTH JUDICIAL DISTRICT
OF TENNESSEE AT UNION CITY

CLIFFORD FERGUSON,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 6437
	)	
v.	)	
	)	
THE UNION CITY DAILY MESSENGER, INC., and DAVID BARTHOLOMEW,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JEAN GREEN

STATE OF TENNESSEE)
) ss:
COUNTY OF OBION)

First having been duly sworn, the affiant states and deposes as follows:

1. That I am a resident of South Fulton, Obion County, Tennessee.

2. That I was an employee of the Union City Daily Messenger between approximately September, 1973 and May, 1984.

3. That I was a staff reporter and editor of the Entertainment Page and Farm Page at the time I left the Union City Daily

Messenger in 1984.

4. That during my employment with The Messenger, I worked in the News Room with defendant, David Bartholomew.

5. That whenever Defendant Bartholomew would leave the offices of The Messenger to cover a County Commission Meeting, he would stop by my desk and state in a loud voice that "they are going to fire your friend today," a reference to the Plaintiff, Clifford Ferguson.

6. That from the time that Clifford Ferguson was hired by County Executor T. W. Jones in approximately 1978, David Bartholomew had only negative things to say about Clifford Ferguson.

7. That from my working closely with David Bartholomew, it was clear that he wanted Clifford Ferguson removed from office.

8. That all of the foregoing statements are made of my own personal knowledge.

FURTHER AFFIANT SAITH NOT.

s:\
Jean Green

SWORN TO AND SUBSCRIBED before me this the 6th day of December, 1989.

s:\ (Wyonna Pruitt)
NOTARY PUBLIC

My Commission Expires:

10-12-92